No. 86-663

In the Supreme Court of the United States

OCTOBER TERM, 1986

LORD ELECTRIC COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the bid-rigging conspiracy charged in the indictment is not the same offense as other conspiracies for which petitioners had previously been prosecuted.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 797 F.2d 1377. The opinion of the district court and the recommendation of the magistrate are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1986. A petition for rehearing was denied on September 19, 1986 (Pet. App. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the so-called "Spurlock conspiracy," an alleged conspiracy to rig bids in 1978 on an electrical construction project for the coal-powered Spurlock II Generating Station in Maysville, Kentucky. Petitioner Lord Electric Company (Lord) is a contractor that bids on large electrical projects, and petitioner Peter F. Matthews is its president. On June 14, 1984, a federal grand jury in the Eastern District of Kentucky indicted petitioners and others for the Spurlock conspiracy. Count one of the indictment charged a violation of Section 1 of the Sherman Act, 15 U.S.C. 1; counts two and three charged violations of the mail fraud statute, 18 U.S.C. 1341. Pet. App. 1a-2a.[1]

Petitioners had previously been acquitted of criminal participation in the so-called "WPPSS conspiracy." The WPPSS conspiracy involved bid rigging on electrical work for nuclear power projects run by the Washington Public Power Supply System and the Public Service Company of Indiana. Pet. App. 4a-5a.

Petitioners moved to dismiss the indictment on the basis of double jeopardy. Petitioners' primary claim was that the Spurlock conspiracy charged in this case was actually part of the WPPSS conspiracy. Alternatively, petitioners argued that both the Spurlock and WPPSS conspiracies were part of an even larger conspiracy involving the nation's largest electrical contractors. Petitioners did not define the scope of their alleged "superconspiracy" and presented no evidence establishing the existence of the superconspir-

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[1] Wente Construction Company, which was also indicted, pleaded guilty. Donald W. McCabe, a vice president of Lord, was indicted and is awaiting trial.

acy.[2] Petitioners also did not explain why, if such a superconspiracy existed, they had not urged it as a bar to any of their prior prosecutions.[3] Petitioners sought to compel further discovery of grand jury transcripts that they hoped might help to establish their claim. Pet. App. 9a-13a.[4]

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[2] Petitioners noted that the major electrical contractors had been prosecuted for bid rigging and that there were some similarities in how bids were rigged on particular projects. Thus, although petitioners presented no direct evidence establishing that there was a single nationwide conspiracy to rig bids on electrical projects, they argued that the existence of such an agreement could be inferred.

[3] Before the decision in this case, Lord had been indicted for bid rigging on electrical construction projects three other times. After its acquittal in the WPPSS conspiracy case, Lord was indicted, tried, and convicted of bid rigging on electrical construction projects in Pittsburgh and Philadelphia. Lord stood trial in Pittsburgh without claiming any double jeopardy defense. In fact, Lord argued in Pittsburgh that the conspiracy charged—rigging bids on electrical construction contracts at United States Steel's Western Pennsylvania Works—was too broad and that the indictment should instead have charged at least 14 separate conspiracies, one for each of the jobs shown at trial to have been rigged. *United States* v. *Fischbach & Moore, Inc.*, 750 F.2d 1183 (3d Cir. 1984), cert. denied, 470 U.S. 1029 (1985). In Philadelphia, Lord made a narrow double jeopardy claim, arguing only that the conspiracy charged —one to rig bids at United States Steel's Fairless Works— was part of the same conspiracy for which it had been convicted in Pittsburgh. The court of appeals rejected that claim. *United States* v. *Sargent Electric Co.*, 785 F.2d 1123 (3d Cir. 1986), cert. denied, No. 85-1936 (Oct. 6, 1986).

[4] Petitioners have not sought review in this Court of the denial of their discovery motions by the magistrate and the district court, which was affirmed by the court of appeals (Pet. App. 13a).

1. On October 24, 1984, the district court referred the double jeopardy and discovery motions to a magistrate (C.A. App. 357). The parties submitted extensive briefs and evidence, including previous indictments, grand jury excerpts, and former trial transcripts bearing on these issues. In a thorough opinion (*id.* at 418-468), the magistrate concluded that the defendants had made a nonfrivolous showing that the Spurlock and WPPSS conspiracies were part of a single conspiracy, but that the government had refuted that showing by a preponderance of the evidence (*id.* at 439-454).[5] The magistrate rejected as

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[5] In the WPPSS case, the government had alleged that the defendants had conspired to allocate nuclear power plant projects among three sets of contractors: WPPSS 1 and 4 to a joint venture of The Howard P. Foley Co. (Foley) and Wismer & Becker Contracting Engineers, Inc.; WPPSS 3 and 5 to Fischbach and Moore, Inc.; and Marble Hill to a joint venture of Lord and Commonwealth Electric Company. The projects ranged in price from $98 to $151 million. Testimony at the WPPSS trial established that these projects were discussed at two meetings in California: one at La Quinta Resort in Palm Springs in April 1978, and one at the Queensway Hilton in Long Beach in May 1978. There is no evidence from the WPPSS trial that any projects other than nuclear power projects were discussed or considered at these meetings. Pet. App. 5a.

In the alleged Spurlock conspiracy, four companies submitted bids for the Spurlock project: Lord, Foley, Sargent Electric Company, and Watson-Flagg Electric Company, Inc. Foley and Wente Construction Co. had formed a joint venture to submit a bid for the Spurlock project. Robert J. Van Divender, who had been in charge of Foley's branch office in Richmond, Virginia, testified that he agreed with petitioner Matthews to rig the $9 million Spurlock project in favor of petitioner Lord because in 1976 Lord had agreed to support Van Divender in rigging an $8 million Union Camp Corporation job in Franklin, Virginia. Wente officials also went

frivolous the defendants' superconspiracy theory (*id.* at 454-459). Assuming that the claim was not frivolous, however, the magistrate concluded that the government had rebutted the showing by a preponderance of the evidence (*id.* at 459-462). The magistrate also stated that, in his examination of "in excess of 200 grand jury transcripts, no substantive suggestion of evidentiary support for the superconspiracy argument arose" (*id.* at 463 (footnote omitted)).

The district court generally adopted the magistrate's findings and conclusions as to the double jeopardy and discovery claims. It held, however, that defendants had made a nonfrivolous showing on their superconspiracy claim as well as their narrow single conspiracy claim. C.A. App. 479-480.

2. The court of appeals affirmed. It began by noting that, under *Braverman* v. *United States*, 317 U.S. 49 (1942), "if the conspiracy charged in this case and the conspiracy of which the defendants were indicted and acquitted in another case were both part of a single agreement, this indictment is barred and must be dismissed" (Pet. App. 3a-4a). The court also held that "the multiple/single conspiracy issue is determined by applying a 'totality of the circumstances' test rather than the more limited 'same evidence' test" (*id.* at 4a).

With respect to petitioners' primary argument that the Spurlock and WPPSS conspiracies were part of a single agreement to rig bids, the court held that the district court's finding that the WPPSS and Spurlock indictments charged separate conspiracies was not

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along with the scheme because, although they had never met Matthews and did not owe Lord any "favors," Matthews agreed to pay Wente $50,000. Pet. App. 2a.

clearly erroneous (Pet. App. 6a-9a). Petitioners have not sought review of that holding.

The court also rejected petitioners' alternative claim of a superconspiracy, reasoning as follows (Pet. App. 12a):

> Assuming, without deciding, that the superconspiracy that defendants describe exists, the evidence in the record shows beyond doubt that it was no more than a passive understanding that bid-rigging was an accepted way to do business.[6] It was well known in the industry that the practice occurred, and the means and jargon employed in each agreement were often identical, but agreements to rig individual project[s] were made only when opportunities arose and * * * the arrangements had to be negotiated "from scratch" each time.

Thus, the court of appeals concluded that, "in view of the nature of the nationwide conspiracy described by the defendants, the conspiracy charged in the indictment before us is, as a matter of law, not the 'same offense' as the other offspring conspiracies for which the defendants have been tried or indicted" (Pet. App. 13a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners, critical of dicta in the opinion of the court of appeals, fail to distinguish those dicta

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[6] The evidence showed "no more than an agreement to agree, a willingness to enter into future illegal compacts" (Pet. App. 11a-12a).

from what the court actually held, and indeed devote virtually none of their petition to defending their own "superconspiracy" theory. The holding of the court of appeals is that the record in this case supports, at most, a finding that petitioners and the other leading electrical contractors had "a passive understanding that bid-rigging was an acceptable way to do business" but that "agreements to rig individual project[s] were made only when opportunities arose and * * * the arrangements had to be negotiated 'from scratch' each time" (Pet. App. 12a). A passive understanding of the kind described is by no stretch of the imagination a conspiracy. For example, a bank robber might have a passive understanding that several of his friends would be willing and able, if asked, to drive the getaway car, and that other friends would be willing and able, if asked, to crack the safe, the next time he robs a bank. That understanding does not amount to a conspiracy between the bank robber and his friends. If the bank robber calls on two of those friends (one expert driver and one expert safecracker) to help him rob Bank A, and later calls on the same or different friends to help him rob Bank B, the government certainly may prosecute both conspiracies separately, as long as both arrangements were negotiated "from scratch." The *holding* of the court of appeals is unassailable.

Rather than attack that holding, petitioners have seized on a comment in the opinion of the court of appeals that could not be correctly applied to the facts of this case and was not the basis of the decision. The court of appeals suggested that there is a class of cases in which the government "may choose to prosecute the parent conspiracy, or it may charge the individual offspring separately" (Pet. App. 12a).

Whatever the merits of that observation generally, it is certainly incorrect if it was meant to imply that the government could have prosecuted something that was "no more than a passive understanding" (*ibid.*) as a conspiracy. "[T]he essence of" any conspiracy "is an agreement to commit an unlawful act" (*Iannelli* v. *United States*, 420 U.S. 770, 777 (1975)), and petitioners' "passive understanding" of what was "acceptable practice in the industry" (Pet. App. 10a) was not such an agreement.

If the government had indicted petitioners for a superconspiracy, and the court of appeals had held that the record in this case supported such an indictment, the court of appeals would have committed error. That is not what happened, however. The court of appeals merely included a dictum that may have been erroneous in an opinion reaching an entirely correct result. That dictum is not a basis for this Court to grant certiorari.

2. a. Petitioners contend that the court below held "that it is permissible for the government to divide a single conspiracy into separate conspiracies and prosecute a defendant in successive indictments for those separate conspiracies" (Pet. 8). From this premise, they argue that the decision below conflicts with this Court's decision in *Braverman* v. *United States*, 317 U.S. 49 (1942), and with the decisions of courts of appeals following *Braverman* (Pet. 8-11). Petitioners' premise is incorrect, however, and no conflict exists.

The court of appeals, far from rejecting *Braverman*, expressly relied on *Braverman* and its own opinions following *Braverman* (Pet. App. 3a-4a). The court recognized that, if an indictment is based on an agreement that is "part" of a larger agreement

on which a former prosecution was based, it "must be dismissed" (*id.* at 4a), and the court did not say, as petitioners repeatedly claim (Pet. 6, 11, 14), that the Spurlock and WPPSS conspiracies were "part" or "parts" of a larger agreement. The court of appeals merely rejected the proposition that a former conspiracy prosecution bars a later one whenever both conspiracies "are, in some sense, products" of a larger understanding (Pet. App. 11a). As the court made clear, the Spurlock and WPPSS conspiracies were "products" of the national "superconspiracy" only in the sense that petitioners might have known "that the [other] participants w[ould] be receptive to requests that some future project be rigged" (*id.* at 12a).

Bids were rigged on a particular project only after an agreement relating to that project was negotiated "from scratch" (Pet. App. 12a). Knowledge that bid rigging was an accepted way of doing business for many companies in the industry simply made negotiations leading to specific agreements to rig bids easier; it did not guarantee that any particular bid would be rigged. Thus, each specific bid-rigging agreement was "independent" of the so-called superconspiracy and a "distinct violation[]" (*ibid.*). On that basis, the court held that the Spurlock conspiracy was "not the 'same offense'" as the WPPSS conspiracy (*id.* at 13a). Therefore, the government could prosecute each individual agreement to rig bids separately (*ibid.*). That essentially factual determination does not conflict with *Braverman* and is entirely consistent with the decisions of other courts of appeals.[7] It does not warrant review by this Court.

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[7] See, *e.g.*, *United States* v. *Sargent Electric Co.*, 785 F.2d 1123, 1132 (3d Cir. 1986) (Stapleton, J., concurring) ("to a firm interested in bid rigging, knowledge as to the identity and

b. Petitioners claim specifically (Pet. 2, 6, 10) that the decision below conflicts with the decision in *United States* v. *Beachner Construction Co.*, 729 F.2d 1278 (10th Cir. 1984). The court below did criticize the rationale of *Beachner*, but that criticism falls far short of a conflict warranting review by this Court.

In *Beachner*, the Tenth Circuit was, apparently, willing to uphold (as not clearly erroneous) the district court's inference of an overarching conspiratorial agreement because "asphalt contractors in Kansas understood for over twenty-five years that the ability to rig bids was available using [a specified] method" (729 F.2d at 1283). The court in this case explicitly labeled that approach "invalid," and indicated that the Tenth Circuit should have examined "the factual nature of the parent and offspring agreements" and "the relationship between them" in order "to determine whether the offspring are independent of or dependent on the parent" (Pet. App. 11a). That single disagreement with *Beachner*'s reasoning, however, does not mean that the court below would have found separate conspiracies in *Beachner*

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trustworthiness of others willing to do the same is of great value * * *," but it is irrelevant to the determination whether bid rigging at different locations was the result of a single conspiratorial agreement or multiple agreements), cert. denied, No. 85-1936 (Oct. 6, 1986); *United States* v. *Korfant*, 771 F.2d 660, 663 (2d Cir. 1985) (fact that "single common actor" participated in and allegedly directed "two sets of conspiratorial activities" that had the common objective of fixing certain grocery prices "d[id] not establish the existence of a single conspiracy" when the evidence established that the conspiracies were functionally independent); *United States* v. *Consolidated Packaging Corp.*, 575 F.2d 117, 128 (7th Cir. 1978) (dictum) (conspiracies that are "spawned" by a larger agreement can be separately prosecuted).

or that the *Beachner* court would have found a single "superconspiracy" here.[8]

There were many additional factors present in *Beachner*, and absent here, that supported a determination that there was a single conspiracy in that case. There was undisputed evidence establishing that there had been a single conspiracy to rig bids in Kansas before 1972 (729 F.2d at 1280). Although the government contended that the single conspiracy had ended in 1972, when the company that directed the bid rigging went out of business and the State changed its procurement methods (*ibid.*), the courts found instead as a matter of fact that the conspiracy was "self-perpetuating in nature" (*id.* at 1282). The Tenth Circuit also found that the various bid-rigging agreements were mutually dependent and interrelated, noting that the conspirators created reciprocal obligations that kept the conspiracy continuing from project to project (*id.* at 1280 & n.5, 1282). That factor is notably absent from the present case, in which the court specifically rejected the "theory that Spurlock was the *quid pro quo* for WPPSS 1 & 4" (Pet. App. 6a) and was not urged to find any other interdependence.

All of the separate bids in *Beachner* were made to a single customer, the Kansas Department of Transportation. By contrast, petitioners' theory is that every bid rigged for any customer anywhere in the country was part of a single conspiracy. *Beachner* also involved a persistent " 'common method' of 'set-

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[8] Most obviously, the holding by the *Beachner* court that the trial court's findings of fact were *not* clearly erroneous cannot be taken to mean that contrary findings of fact, on a different record (or even the same one), *would* have been held to be clearly erroneous.

ting up' a job," which apparently any contractor in Kansas could " 'plug[] into' at any time" (729 F.2d at 1282). The courts below found no similar evidence in this case.[9] Indeed, the court of appeals that considered the Philadelphia conspiracy (which would be part of petitioners' "superconspiracy" if their theory were accepted) found enormous differences between the way petitioners and their co-conspirators did business in different locations (*Sargent Electric Co.*, 785 F.2d at 1131; *id.* at 1132-1133 (Stapleton, J., concurring)).

In these circumstances, there is no real conflict between the decision below and *Beachner*. The two courts of appeals applied their methods of analysis to two very different factual situations and, not surprisingly in light of the factual differences, reached different conclusions. That is not the kind of conflict in the circuits that requires resolution by this Court.

c. Petitioners attack use of the "same evidence" test in distinguishing single from multiple conspiracies, and complain that the approach adopted by the court of appeals in this case is equally unworkable (Pet. 11-14). Petitioners' attacks on the "same evidence" test are of no particular moment, however, because the court of appeals agreed with them that a "totality of the circumstances" test was preferable (Pet. App. 4a). Petitioners' attacks on the approach

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[9] The magistrate found that there was "a [de minimis] overlap in personnel between the" various conspiracies that petitioners suggest might be part of the superconspiracy (C.A. App. 459-460). "That, coupled with an overly broad time period of twelve years, various unconnected overt acts, and geographically distinct phone conversations and meetings from which bid rigging was to have arisen, all support a theory of separate conspiracies" (*id.* at 460 (footnotes omitted)).

that the court of appeals *did* use are either wrong, or premature, or both. If petitioners are suggesting that a court should not attempt to distinguish a mere "passive understanding" about acceptable industry practice from an actual conspiratorial agreement, they are simply wrong. Such a "passive understanding" is not an agreement, and without an agreement there is no conspiracy (see pages 7-8, *supra*). If petitioners' complaint is that the court of appeals suggested that a "passive understanding" is a "prosecutable offense[]" (Pet. 14), then we agree with them that that suggestion, if intended, was erroneous (see pages 7-8, *supra*). It will be time enough to correct that error, however, when and if any court ever *holds* that an indictment based on such a "passive understanding" is sufficient. Petitioners, who have not been prosecuted on the basis of a "passive understanding," are not entitled to a writ of certiorari simply because the court of appeals may have suggested that such an understanding was itself prosecutable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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